1992

The State of Utah v. Jason Ewell : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH,	:	
Plaintiff/Appellee,	:	
v.	:	
JASON EWELL,	:	Case No. 920379-CA Priority No. 2
Defendant/Appellant.	:	

BRIEF OF APPELLANT

Appeal from judgments and convictions for two counts of aggravated robbery, first degree felonies, in violation of Utah Code Ann. § 76-6-302 (1990 Repl. Vol.), in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable James S. Sawaya, Judge, presiding.

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STATEMENT OF JURISDICTION

Utah Code Ann. section 78-2a-3(2)(j) (1992 Repl. Vol.) provides this Court's jurisdiction over this case transferred from the Utah Supreme Court.

STATEMENT OF ISSUES

1. Did the trial court commit reversible error in conducting an inadequate voir dire, and denying the motion for a mistrial stemming from a juror's concealment of material information during voir dire?

2. Did the trial court misconstrue the firearm enhancement statute in sentencing Mr. Ewell?

STANDARDS OF REVIEW

In assessing the trial court's voir dire of the prospective jurors, this Court will review with some deference the totality of the questioning to determine if the trial court provided Mr. Ewell with sufficient information to evaluate the jurors, or whether the

trial court abused his discretion. State v. Bishop, 753 P.2d 439, 448 (Utah 1988). The remaining questions involve questions of law, which this Court addresses under the non-deferential correction of error standard of review. E.g. State v. Ramirez, 817 P.2d 774, 781-782 n.3 (Utah 1991).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Appendix 1 to this brief contains the full text of the following controlling constitutional and statutory provisions:

Constitution of Utah, Article I section 7
Constitution of Utah, Article I section 10
Constitution of Utah, Article I section 12
Constitution of Utah, Article V section 1
United States Constitution, Amendment V
United States Constitution, Amendment VI
Utah Code Ann. section 76-3-203
Utah Code Ann. section 76-6-302
Utah Code Ann. section 76-8-1001
Utah Code Ann. section 77-1-6
Utah Rule of Civil Procedure 46
Utah Rule of Civil Procedure 47
Utah Rule of Criminal Procedure 18
Utah Rule of Criminal Procedure 20.

STATEMENT OF THE CASE

Mr. Ewell was charged with one count of aggravated robbery, one count of theft, and one count of theft by deception in case no. 911901243, and with a count of aggravated robbery in case no. 911901244. The magistrate found probable cause in both cases, and bound the cases over to district court. In case no. 911901243, Mr. Ewell pled guilty to one count of aggravated robbery and the theft and theft by deception charges were dismissed. In case no. 911901244, Judge Sawaya presided over a jury trial on December 12

and 13 of 1991. The jury convicted Mr. Ewell as he was charged, and Judge Sawaya sentenced Mr. Ewell to serve a term of five years to life with a one year firearm enhancement for the conviction charged in case no. 911901243, to a consecutive term of five years to life with a firearm enhancement for the conviction charged in 911901244, and to an additional five years, pursuant to Utah Code Ann. section 76-3-203(4).

Mr. Ewell appealed in both cases, and on Mr. Ewell's motion, this Court consolidated the appeals.

On October 15, 1992, counsel for Mr. Ewell moved this Court to take judicial notice of and/or supplement the record with a transcript of a voir dire from a criminal case before Judge Rokich, because the foreman of Mr. Ewell's jury admitted to a bias against non-testifying criminal defendants in the Rokich voir dire, but did not disclose this during the Ewell voir dire, which occurred two days after the Rokich voir dire. The State opposed the motion, arguing that this Court should wait to address the judicial review issue until briefing is complete, that supplementation of the record was not appropriate, and that the briefing schedule should be reset. This Court denied the motion, but did not indicate whether the denial was with prejudice, or reflected the State's position that the motion was premature. Mr. Ewell hereby renews the motion. A copy of the motion, the State's response, and this Court's order are in Appendix 2 to this brief. A copy of the Rokich transcript was filed with this Court and with the Attorney General's Office when the motion was originally filed.

STATEMENT OF FACTS

Donald Runyon robbed Christopher Ward Hase at the point of a shotgun, as Mr. Hase was walking out of the Midvale Mining Company Restaurant with two cash bags on May 28, 1991 at about 9:15 to 9:30 a.m. (T. 44-54). The restaurant is located at 390 West 7200 South (T. 44). Mr. Hase gave Mr. Runyon one of the cash bags, and later threw the other bag under a car (T. 53-54). Mr. Hase resisted Mr. Runyon's demand to relinquish all of the money, and a struggle ensued, in which Mr. Hase knocked the shotgun and cash bag on the ground and pinned Mr. Runyon to the ground (T. 54-56, 70). Mr. Hase felt someone hitting him on the head and trying to pull him off of Mr. Runyon from behind, and his employees then came to his rescue and helped him restrain Mr. Runyon (T. 57). Mr. Hase was apparently hit with what could have been the shotgun, and required approximately twenty seven stitches (T. 57, 72).

The person who hit Mr. Hase from behind did not take either cash bag -- one bag was still under the car, where Mr. Hase had thrown it, and one was still on the ground (T. 57, 70).

Mr. Hase remembered a blue and white van with Larry H. Miller plates, and remembered seeing a person with a nylon-masked face get in the van and drive away (T. 58-59). He described the person as being "shorter," "five sevenish," male, caucasian, with blonde hair that Mr. Hase could see from under the nylon (T. 59). The person in the van drove the van "in and out" (apparently of the restaurant parking lot) a couple of times, and then drove off on Fourth West (T. 59).

Mr. Hase recognized Mr. Ewell in court because Mr. Ewell used to work as a dishwasher and his mother was a night waitress and his step-father was a dishwasher at the restaurant (T. 47-48, 73). Mr. Hase had not seen Mr. Ewell's mother for five or six months prior to the robbery, had not seen Mr. Ewell's step-father for a couple of months prior to the robbery, and could not recall when he had last seen Mr. Ewell prior to the robbery (T. 75).

Mr. Hase testified that he had described the van to the police, but had not described the driver or accused Jason Ewell as being involved in the robbery (T. 76).

Mr. Hase indicated that he and Mr. Ewell had had a "run-in" over a check (T. 75).

Billy Kunz, a cook from the restaurant, could not describe any features of the driver of the van, but did indicate that the sawed-off, stockless shotgun he found was unloaded (T. 78-88). He also indicated that the van he saw driving away was a newer model, and blue and white (T. 89).

Elaine Anderson, a prep cook from the restaurant, saw Chris Hase on top of Mr. Runyon, and saw the nylon-masked person who had a medium build, weighed about 160 or 170 pounds, and was holding a shotgun (T. 90-95).

Jimmy Powell, a dishwasher at the restaurant, testified that he tried to grab a cash bag from the masked person, who was sitting in a blue and white van (T. 101-104). He later clarified that he thought the masked person had the cash bag, which was actually on the ground (T. 108). Mr. Powell grabbed on to the side

of the van and held on while the masked person was driving, but eventually let go (T. 104-106). He did not see the features of the masked person (T. 106).

Officer Bradley Hunter responded to the robbery, to find an unidentified restaurant employee beating on Mr. Runyon (T. 109-113). He noted that the shotgun had blood and fingerprints on it, was not loaded, and had been used as "a hitting instrument" (T. 114-115). There were no fingerprints recoverable from the shotgun (T. 120). The masked suspect did not take the cash bags or any restaurant property with him (T. 119).

Officer Courtney Nelson indicated that he participated in the search for Mr. Ewell, and that the officer was in the police department when Mr. Ewell was bought in, about an hour after the robbery was initially reported (T. 120-124).

Officer Ondrak was driving an unmarked police car around looking for the blue and white Chevy van with no plates and Larry Miller stickers on it (T. 125-128, 129, 144). He began looking at between 9:30 and 9:45 p.m. (T. 142). He found a van meeting that description at 80th South and State Street at about 10:55 a.m. (T. 128). He identified Mr. Ewell as the driver of the van (T. 130). Officer Ondrak activated his lights and siren, but the van did not stop (T. 132). Officer Ondrak chased the van going 60 miles an hour in a residential, twenty-five-mile-an-hour zone, and let a marked car intercede in the chase (T. 132-134). The van hit two poles, a tree and a marked police car, which in turn, hit another marked police car (T. 132-134). When Officer Ondrak next saw the van after

the car accidents, the van and another marked police car were parked and empty on a street, and a citizen told Officer Ondrak "They went that way," pointing (T. 134).

Numerous officers searched for the van driver, and Officer Ondrak eventually found Mr. Ewell scrunched up behind a chair in a stairwell (T. 137). There was a fifteen minute space of time between when Officer Ondrak found the parked van and found Mr. Ewell (T. 150). Officer Ondrak directed Mr. Ewell to come out from under the stairs, and Mr. Ewell did so, indicating that he would not resist Officer Ondrak (T. 139).

Officer Carr was involved in the chase, and indicated that Mr. Ewell was the person he saw exit the van after the van hit the tree (T. 163).

Michelle Andrus testified that Mr. Ewell knocked on her door at about 11:00 a.m. on the morning of May 28, 1991, and asked to use her phone, telling her that he had been robbed (T. 169-170). "He said that he was -- that he had gone to a restaurant for coffee with someone he met the day before introduced by his father-in-law. He had been introduced to the gentleman by the father-in-law. They had gone to get something to eat and he went out to the car and the man came up with money bags, he had no idea what was going on and that the police were after him." (T. 170-171). She indicated that he was talking fast, and she was really uncomfortable (T. 171). She suggested that he turn himself in, and he told her that there was a warrant for his arrest and his wife was due to give birth to a child any day (T. 171). He then left her apartment (T. 171).

She indicated that he told her that "there had been a robbery and he was not with -- he had just been coming by for coffee and that the guy came up -- with the money bags. He was running from the police because he had a warrant for his arrest." (T. 174).

Donald Runyon testified that he was sentenced to a term of five years to life for a different aggravated robbery, and that he was serving it at the Gunnison Prison (T. 178). When Mr. Runyon pled guilty to that aggravated robbery, the State dismissed the aggravated robbery charge stemming from this case and three or four other charges of aggravated robbery (T. 183-184). Mr. Runyon indicated that he did not wish to testify against Mr. Ewell or at all (T. 179). He admitted that he drove a van with Jason Ewell to the restaurant, intending to rob the restaurant on May 28, 1991, indicating that it was Mr. Ewell's idea (T. 179-180). He identified the shotgun used in the robbery, indicating that they had gotten it from Mr. Ewell's step-father about two weeks before the robbery (T. 181). Mr. Runyon did not see Mr. Ewell outside of the van, but testified that Mr. Ewell was to help him if the robbery went awry, and that Mr. Ewell did come and help him (T. 182-183). Mr. Runyon indicated that he had not been promised anything or threatened into testifying, but stated his awareness that he might be able to improve his chances for parole by testifying against Mr. Ewell (T. 186).

Defense counsel called Detective Ondrak to testify in the defense case, and the officer established that it takes about 7 to 10 minutes to travel from the restaurant to the intersection where

Officer Ondrak first spotted the van, over an hour after the robbery (T. 189).

SUMMARY OF ARGUMENT

The trial court should have granted Mr. Ewell's motion for a mistrial, when it came to light that one of the jurors had failed to reveal his bias against the right against self-incrimination, a bias to which he had admitted in a different voir dire before a different judge of the Third District Court, two days before the voir dire in Mr. Ewell's case. Mr. Ewell did not testify, and this juror who had previously confessed a concerns about a defendant's exercise of the right not to testify was the foreman of Mr. Ewell's jury (T. 219-220). Particularly in light of the impact of the other voir dire on the voir dire in Mr. Ewell's case, the voir dire in Mr. Ewell's case was inadequate to insure his right to a fair trial before an impartial jury.

The trial court misinterpreted the firearm enhancement statute in sentencing Mr. Ewell to an extra term of five years.

ARGUMENT

I.
THE TRIAL COURT SHOULD HAVE CONDUCTED AN ADEQUATE VOIR DIRE AND GRANTED THE MISTRIAL MOTION STEMMING FROM A JUROR'S PROVISION OF MATERIAL MISINFORMATION DURING VOIR DIRE.

A. IT IS THE TRIAL COURT'S RESPONSIBILITY TO INSURE THE DEFENDANT'S RIGHT TO A FAIR TRIAL BY AN IMPARTIAL JURY.

The state and federal constitutions require trial courts to

insure fair trials by conducting sufficient voir dire proceedings. State v. Bishop, 753 P.2d 439, 448 and nn.1-6 (Utah 1988)(citing Article I, sections 7, 10 and 12 of the Utah Constitution, and the Fifth and Sixth Amendments to the United States Constitution). The Utah Supreme Court has exercised its supervisory power to reiterate to the trial courts of this state that it is their responsibility to insure that voir dire proceedings not only provide adequate information for the informed exercise of peremptory challenges, but also eliminate bias and prejudice from criminal trials. State v. James, 819 P.2d 781, 797-798 (Utah 1991). In James, the court directed the trial courts to go beyond the minimally adequate voir dire required by federal constitutional standards, to thoroughly detect and probe juror biases to the best of their ability. Id. Utah's allegiance to the need for thorough voir dire in criminal cases has been strong and consistent. E.g. State v. Kavmark, 195 Utah Adv. Rep. 7 (Utah App. 1992); State v. Worthen, 765 P.2d 839, 844-845 (Utah 1988); State v. Ball, 685 P.2d 1055, 1058-1061 (Utah 1984).

Utah Code Ann. section 77-1-6(1)(f) codifies the right to an impartial jury, and Utah Rule of Criminal Procedure 18 (e)(14) requires trial courts to conduct voir dire proceedings that are adequate to reveal juror bias. The rule provides that a juror should be removed for cause if the voir dire indicates "that a state of mind exists on the part of the juror with reference to the cause, or to either party, which will prevent him from acting impartially and without prejudice to the substantial rights of the party

challenging[.]"

Trial courts are granted broad discretion and carry a heavy responsibility in conducting voir dire in criminal cases. E.g. Mu'Min v. Virginia, 114 L.Ed.2d 493, 504-510 (1991); State v. James, 819 P.2d 781, 797-798 (Utah 1991). Under the Utah Rules of Criminal Procedure, trial courts are not required to use voir dire questions requested by defense counsel in criminal cases, and defense attorneys are not required to object to the omissions of the trial courts. Compare Utah Rules of Criminal Procedure 18 and 20(b) with Utah Rules of Civil Procedure 46 and 47(a). The rules of criminal procedure are consistent with the Utah Supreme Court's exhortations to the trial courts to conduct effective voir dire, and with the constitutional rights at stake in criminal cases. E.g. State v. James, 819 P.2d 781, 797-798 (Utah 1991); State v. Bishop, 753 P.2d 439, 448 and nn.1-5 (Utah 1988).

B. IN CONDUCTING THE VOIR DIRE AND RULING ON THE MOTION FOR A MISTRIAL, THE TRIAL COURT DEFEATED MR. EWELL'S RIGHTS TO A FAIR TRIAL BEFORE AN IMPARTIAL JURY.

In assessing the trial court's voir dire of the prospective jurors, this Court will review the entire voir dire to determine if the trial court abused his discretion. Bishop, supra. Because the foreman of Mr. Ewell's jury was excused for his bias against a defendant's exercise of his right not to testify, in a voir dire before Judge Rokich two days before the trial in this case (T. 219-220; 175-176), and because Judge Sawaya was apparently aware of the unusual events in the Rokich voir dire when Judge Sawaya

conducted the voir dire in Mr. Ewell's case (T. 217-218), it may be necessary for this Court to review the Rokich voir dire in order to assess the issues raised in this point.

Counsel for Mr. Ewell renews the motion for judicial notice of and/or to supplement the record with the Rokich transcript. The State should address the judicial notice issue on the merits on appeal, so that this Court has a full opportunity to consider it.[1] A copy of the motion, the State's response, and order denying the motion are in Appendix 2, and a copy of the Rokich voir dire was filed in this Court and with the Attorney General's Office with the motion for judicial notice and/or to supplement the record.

Regardless of whether this Court uses the Rokich voir dire,

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1. In opposing the motion, the State argued,

> The State takes no position on the issue at this time, but advises that defendant's request is premature and would be more fully and accurately addressed and decided in the context of the entire case upon full briefing and analysis of all the proceedings and evidence had below. Full briefing of all the issues on appeal is further warranted where reversal on any of the remaining issues raised by defendant would render consideration of the judicial notice issue unnecessary. Inclusion of the issue in the parties' briefing of the entire appeal would neither overburden nor complicate the briefing process and would engender no delay or prejudice to either side.
>
> Should this Court choose to resolve the judicial notice issue prior to plenary briefing of the appeal, the State would request an opportunity to address the merits of the issue.

State's Memorandum at 3-4.

after reviewing the record in this case, this Court should conclude that in denying the motion for a mistrial and in conducting the voir dire, the trial court fell short of the court's state statutory and constitutional, and federal constitutional duties to insure Mr. Ewell's right to a fair trial by an impartial jury.

The following discussion will refer to the Rokich voir dire only to the extent that it is referred to in the record in Mr. Ewell's case.

At the beginning of the second day of trial, outside the presence of the jurors, defense counsel moved for a mistrial because he had discovered the night before that one of Mr. Ewell's jurors, Jeffrey Bogaard, had previously been excused for cause after he had indicated during Judge Rokich's voir dire in another case that Juror Bogaard would want to know why a criminal defendant did not testify when he was questioned concerning his potential biases about the defendant's right not to testify. Defense counsel noted that he was unsure as to exactly what Mr. Bogaard had said during the Rokich voir dire. Defense counsel noted that Juror Bogaard had not indicated any potential bias concerning the defendant's right not to testify during the voir dire by Judge Sawaya in this case. Defense counsel indicated that Mr. Ewell did not intend to testify, indicated that Juror Bogaard's impartiality under Utah Rule of [Criminal] Procedure 18(e)(14) had been drawn into question, and that a mistrial was appropriate (T. 175-76).

The trial court indicated it was his intention to deny the motion, but allowed the prosecutor to argue. The prosecutor argued

that the record was insufficient to support a motion for a mistrial, that defense counsel had the opportunity to voir dire the jurors, and that defense counsel was relying on hearsay from other defense attorneys in seeking a mistrial. The prosecutor indicated that he himself did not know which jurors served on Judge Rokich's panel, and informed Judge Sawaya that the court was not in a position to make a finding on that question. The prosecutor indicated that defense counsel was aware of something having happened (apparently the Rokich voir dire) the day before the Sawaya voir dire, and had the opportunity to participate in voir dire, and should not be arguing on the basis of hearsay concerning what occurred in the Rokich voir dire (T. 176-177).

The court ruled,

> I don't know what happened in Judge Rokich's court or what attitude Mr. Bogaard may have had at that time, but I am satisfied that during my voir dire of the panel, Mr. Bogaard and all the other jurors indicated they would be willing to follow the law as I instructed them and part of that was that the defendant has a right not to testify and that his failure to testify is not a circumstance that you can hold against him and no presumptions against him can be raised. I am satisfied that Mr. Bogaard and all the members of this panel are willing to follow the law of the case as I state it and that no adverse presumption would be raised against the defendant. So the motion will be denied.

(T. 177).

After the jury retired to deliberate, defense counsel sought to clarify the record. Defense counsel indicated his previous and incorrect assumption that the jurors who had indicated a bias against a defendant exercising his right to silence in the

Rokich voir dire were not recycled in Judge Sawaya's court, and that he was unaware of the need to voir dire the jurors on their experience in Judge Rokich's voir dire in this case. (T. 217). Despite the trial court's indication that argument was unnecessary, the prosecutor stated his recollection of an in-chambers discussion of the fact that jurors excused from Judge Rokich's court would be recycled in Mr. Ewell's case, and discussion of the reason that the jurors had been excused from Judge Rokich's court. (T. 217-218).

The court again ruled,

> I think the record has been made clear about the court's feeling about what occurred. I don't feel that the fact that they were disqualified or excused from service in Judge Rokich's court disqualifies them in service in this court. I think the court's questions on voir dire to each of those panel members gave them an opportunity to disclose their feeling or their reluctance to serve in this case based upon the defendant's failure to testify. No one responded. Even the one juror that was seated, Mr. Bogaard, was given an opportunity to indicate that the fact that the defendant might not testify would raise some questions in his mind about the response. I don't think there's any reason to feel that the jury was in any way tainted or that the defendant has been prejudiced in any manner by Mr. Bogaard being seated. So I think the record is clear on that issue.

(T. 218).

The trial court erred in ruling that Juror Bogaard's failure to reveal his bias against a defendant's right not to testify during the Ewell voir dire obviated any need to inquire into Juror Bogaard's previous expression of that bias in Judge Rokich's voir dire. As defense counsel argued to the trial court, Juror Bogaard's failure to reveal this bias that he had expressed only two

days before in a voir dire in a criminal case with Judge Rokich calls Juror Bogaard's honesty and impartiality into question. See State v. Suarez, 793 P.2d 934 (Utah App. 1990).

In Suarez, a district court judge presiding over a criminal case declined to excuse for cause a recycled prospective juror who had been excused for cause in a different district court criminal voir dire. According to an affidavit of a defense attorney from the first voir dire, the prospective juror had expressed a pro-police bias during the first voir dire; yet the juror failed to reveal this bias in the second voir dire. Id. at 936. This Court set forth the two-pronged test for assessing such issues:

> To obtain a new trial, a defendant "must first demonstrate that a juror failed to answer honestly a material question on voir dire, and then further show that a correct response would have provided a valid basis for a challenge for cause."

Id. at 938, quoting McDonough Power Equip., Inc. v. Greenwood, 464 U.S. 548, 556 (1984).

The Suarez Court addressed the second prong first, finding the second prong readily met, because the prospective juror's pro-police bias would have provided a basis for a for-cause challenge. Id. at 938. Similarly, had Juror Bogaard indicated his concern about a defendant's exercise of his right not to testify, this would have provided a basis for a challenge for cause, particularly in this case where Mr. Ewell had submitted voir dire questions and jury instructions on inferences to be drawn from the defendant's exercise of his right not to testify (R. 27, 64),

indicated early in the voir dire that he might not take the stand (T. 11), and did not take the stand. Utah Rule of Criminal Procedure 18(e)(14) (juror must be excused if "a state of mind exists on the part of the juror with reference to the cause, or to either party, which will prevent him from acting impartially and without prejudice to the substantial rights of the party[.]") (emphasis added). See also, e.g., State v. Wilson, 771 P.2d 1077, 1083-84 (Utah App. 1989)(juror who expressed view that defendant had burden to establish his innocence was sufficiently rehabilitated by further questioning to qualify for service).

In addressing the first prong of the test, the Suarez Court did not explicitly reach the conclusion that the juror had failed to honestly answer a voir dire question. The Court recognized that dishonesty was not the only explanation for the juror's failure to express the bias in the second voir dire to which he had admitted in the first voir dire, indicating that the juror may have lied in the first voir dire to avoid jury service and then had a change of heart between the two jury selections, or that the juror may have lost the bias between the two jury selections. Suarez, 793 P.2d at 939 n.11. The Suarez Court concluded on the record before the Court, wherein the juror's comments in the first voir dire were recorded in a perhaps imprecise affidavit of an attorney involved in the first voir dire, and wherein the second trial court did not consult with the first trial court or investigate the discrepancy between the two jury selections with the juror, the trial court should have granted the challenge for cause. Id. at 939. In so concluding, the Suarez

Court relied on the well-established body of Utah law that when a prospective juror makes statements implying bias, the trial court must excuse the juror for cause, or examine the juror sufficiently to rebut the inference of bias. Id. at 939 and n.11, citing State v. Bailey, 605 P.2d 765 (Utah 1980).[2]

Similarly, in the instant case, Judge Sawaya neither conferred with Judge Rokich on the record, nor investigated the discrepancy between Juror Bogaard's answers during the Rokich and Ewell jury selections. On this record, the trial court did not rebut the inference of bias arising from Juror Bogaard's concern about the defendant's right not to testify, and under Suarez, Mr. Ewell is entitled to a new trial. See also State v. Thomas, 777 P.2d 445, 451 (Utah 1989)(court remanded case to trial court to determine if jurors had been dishonest in failing to answer a material voir dire question, because voir dire question at issue was vague, and jurors may not have understood it); State v. Thomas, 830 P.2d 243 (Utah 1992)(plurality)(majority reversing trial court's conclusion that the jurors had failed to honestly answer a material

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2. See also State v. Kavmark, 195 Utah Adv. Rep. 7 (Utah App. 1992); State v. Cobb, 774 P.2d 1123, 1126 (Utah 1989)(juror acquaintance with prosecutor, when probed during voir dire, did not raise inference of bias requiring rebuttal); State v. Woolley, 810 P.2d 440, 442-448 (Utah App.)(inference of bias arising from juror's prior victimization of same crime at issue in case was not sufficiently rebutted), cert. denied, 826 P.2d 651 (Utah 1991); State v. Cox, 826 P.2d 656, 658-661 (Utah App. 1992)(trial court failed to remove juror for cause, or to examine her to determine if inference of bias stemming from her relationships with the prosecutor and police was rebutted).

question during voir dire, plurality expressing various views as to interpretation of the second prong of the test on the facts of that case).

The voir dire itself demonstrates that the trial court neglected his responsibility to insure Mr. Ewell's rights to a fair and impartial jury trial. It appears from the prosecutor's argument to the trial court that prior to the voir dire in Mr. Ewell's case, the court was aware that recycled jurors from Judge Rokich's voir dire had indicated a bias against defendants who exercise their rights against self incrimination (T. 217-218). It appears from the Ewell voir dire that the trial court was determined to seat a jury that appeared impartial, and that the trial court may have intimidated the jurors to accomplish this end. For instance, at the outset of the voir dire, the trial court asked the jurors to state their name, occupation, spouse's name, and spouse's occupation, and the court unexpectedly villified one of the prospective jurors. The court's colloquy with one of the prospective jurors was as follows:

> Q: Delbert Iorg?
> A: None, none and single.
> Q: No occupation?
> A: No.
> Q: You have never worked in your life?
> A: Cleaning horse stalls for my dad.
> Q: Must do something, Mr. Iorg.
> THE COURT: You don't want to be here, do you?
> A: I don't know.
> THE COURT: We'll let you sit through the whole trial whether you like it or not.

(T. 7). In later voir dire, Mr. Iorg indicated that he read the Deseret News, and the trial court asked him, "Okay, what's the limit of your education?" (T. 30). Other jurors were asked how far they

went in school (T. 26), or their "education" (T. 26, 31). This series of events undoubtedly encouraged the jurors to answer the voir dire questions in a manner pleasing to the trial court, and chilled juror participation during the voir dire. See State v. Worthen, 765 P.2d 839, 844-845 (Utah 1988)(voir dire is supposed to be a subtle and accurate culling of subconscious and conscious information from prospective jurors).

The trial court's pontifications on the defendant's right not to testify further demonstrate the trial court's failure to seek out, rather than suppress, juror biases. When the trial court asked defense counsel to identify the defense witnesses during voir dire, and defense counsel indicated that the defendant might or might not testify, rather than inquiring into potential biases, the trial court instructed the jurors as follows:

> All right. Under the law, ladies and gentlemen, a defendant charged with a criminal offense is presumed to be innocent until he's been proved guilty beyond a reasonable doubt. This defendant comes here clothed with the presumption of innocence, meaning that the state has the burden of proving his guilt beyond a reasonable doubt. If the evidence doesn't rise to that level then your duty as jurors would be to return a verdict of not guilty. The defendant has a right to remain silent meaning he doesn't have to take the stand and testify unless he wishes to. The defendant may be satisfied with the evidence presented by the state and feel that there's nothing to add to it. Are there any of you who feel you cannot afford the defendant the benefit of the presumption of innocence and his right to remain silent? If for any reason you feel he is not entitled to those rights, would you raise your hand. The record may show that no hands are raised.

(T. 11-12).

During voir dire, defense counsel asked the court to inquire about whether the jurors felt that a defendant should come forward and testify, despite his right not to do so (T. 32). Rather than seeking out juror bias, the court again instructed the jurors,

> Let me explain that before you respond to it. No criminal defendant has an obligation to testify. The constitution preserves the right to the remain silent of anybody who's accused and the fact that a defendant does not take the stand and testify can't be used against him. You can raise no presumptions against him because of that fact. I will ask whether or not, if this defendant for example decides not to testify, whether any of you would hold that against him or find that is something that is -- you should consider against him in determining his guilt or innocence? If you feel that way would you raise your hand. The record may show that no hands are raised.

(T. 32).

During the course of the voir dire, not one prospective juror ever admitted to any bias that would impact on the juror's performance. After reviewing the overall voir dire, this Court should conclude that the trial court's voir dire was inadequate to provide counsel with sufficient information about the prospective jurors, and that a new trial is in order.

II.
THE TRIAL COURT MISINTERPRETED THE FIREARM STATUTE IN SENTENCING MR. EWELL.

The trial court sentenced Mr. Ewell for his aggravated robbery conviction stemming from his guilty plea in case no. 911901243, and for his aggravated robbery conviction stemming from the jury conviction in case no. 9119011244, in a hearing on February

28, 1992. In case no. 911901244, the trial court imposed a five to life sentence for the aggravated robbery conviction, and a one year firearm enhancement (T. 235). In case no. 911901243, the trial court imposed a five to life sentence for the aggravated robbery conviction, and a one year firearm enhancement (T. 235). The court then indicated that the statute mandated an additional five year sentence because there were "two offenses committed with the use of a firearm." (T. 236). The court ordered the sentences for the two cases to run consecutively, ordering a total sentence of seventeen years to life (T. 235-236).

The statute governing the propriety of the five year firearm enhancement stemming from the two convictions is Utah Code Ann. section 76-3-203. It states, in relevant part,

> A person who has been convicted of a felony may be sentenced to imprisonment for an indeterminate term as follows:
>
> (1) In the case of a felony of the first degree, for a term at not less than five years, unless otherwise specifically provided by law, and which may be for life but if the trier of fact finds a firearm or a facsimile or representation of a firearm was used in the commission or furtherance of the felony, the court shall additionally sentence the person convicted for a term of one year to run consecutively and not concurrently; and the court may additionally sentence the person convicted for an indeterminate term not to exceed five years to run consecutively and not concurrently;
>
> ....
>
> (4) Any person who has been sentenced to a term of imprisonment for a felony in which a firearm was used or involved in the accomplishment of the felony and is convicted of another felony when a firearm was used or involved in the accomplishment of the felony shall, in addition to any other sentence imposed, be sentenced for an indeterminate term to be not less than five nor more than ten years to run consecutively and not concurrently.

In imposing the consecutive five year firearm enhancement, the trial court misconstrued subsection (4) of section 76-3-203. Under subsection (4), the enhancement is only applicable if one who "has been sentenced" for a firearm felony is "convicted" of another firearm felony. Mr. Ewell was sentenced for both firearm felonies on February 28, 1991, and both of his convictions preceded this date: in case no. 911901243, Mr. Ewell's conviction was established by his guilty plea on January 10, 1992; in case no. 900901244, Mr. Ewell's conviction was established by the jury verdict on December 13, 1991.

Because the sentencing of a firearm felony did not precede the conviction of the other firearm felony, under the plain language of the statute, the firearm enhancement in subsection (4) does not apply. In using the terms "has been sentenced" and "convicted,"[3]

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3. Black's Law Dictionary defines the term conviction as follows:

> In a general sense, the result of a criminal trial which ends in a judgment or sentence that the accused is guilty as charged.
>
> "Conviction" and "convicted" mean the final judgment on a verdict or finding of guilty, a plea of guilty, or a plea of nolo contendere, and do not include a final judgment which has been expunged by pardon, reversed, set aside, or otherwise rendered nugatory. 18 U.S.C.A. § 4251.
>
> The final consummation of the prosecution including the judgment or sentence, or as is frequently the case, the judgment or sentence itself. Ex parte White, 76 Okl.Cr. 204, 130 P.2d 103, 104. The stage of a criminal proceeding where the issue of guilt is determined. United States v. Locke, 409 F.Supp. 600.
>
> A record of the summary proceedings upon any penal statute before one or more justice of the

(footnote continues)

the legislature indicated an intent that crimes used for this five to ten year consecutive enhancement must follow sequentially.[4] The legislature's choice to impose the additional five to ten year consecutive sentence only for firearm felony convictions involving a defendant who "has been sentenced" for a firearm felony reflects the legislature's choice to impose the harshest penalty on those defendants who have experienced a firearm-enhanced sentence, and then incur another felony firearm conviction. Compare the firearm enhancement statute with the habitual criminal statute, Utah Code Ann. section 76-8-1001 (imposing enhancement regardless of sequence of convictions). See United States v. Abreu and Thornbrugh, 962 F.2d 1447 (10th Cir. 1992)(en banc)(court reversed firearm enhancement under federal statute, because convictions underlying

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(footnote 3 continued)

> peace or other persons duly authorized, in a case where the offender has been convicted and sentenced.

Black's defines sentence as follows:

> The judgment formally pronounced by the court or judge upon the defendant after his conviction in a criminal prosecution, imposing the punishment to be inflicted. Judgment formally declaring to accused legal consequences of guilt which he has confessed or of which he has been convicted. The word is properly confined to this meaning. ...

4. While the terms conviction and sentence are sometimes used interchangeably in legalese, e.g. State v. Duncan, 812 P.2d 60, 62-64 (Utah App. 1991), the fact that the legislature used the two different terms in the same statute indicates that the legislature indicated for the terms to have separate meanings. E.g. Seeber v. Washington State Public Disclosure Commission, 634 P.2d 303 (Wash. 1981). See also Madsen v. Borthick, 769 P.2d 245, 252 n.11 (Utah 1988)(court has "fundamental duty to give effect, if possible, to every word of the statute.").

enhanced sentence did not meet sequential requirement of statute).

Adherence to the plain language of statutes is required by the constitutional doctrine of separation of powers, which is explicitly required in Article V section 1 of the Utah Constitution. As Sutherland explains,

> The preference for literalism in determining the effect of a statute is based on the constitutional doctrine of separation of powers. The courts owe fidelity to the will of the legislature. What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. Therefore, the courts are bound to give effect to the expressed intent of the legislature. The Rhode Island Supreme Court has captured this idea in the following language: "It is an elementary proposition that courts only determine by construction the scope and intent of the law when the law itself is ambiguous or doubtful. If a law is plain and within the legislative power, it declares itself and nothing is left for interpretation. It is as binding upon the court as upon every citizen. To allow a court, in such a case, to say that the law must mean something different from the common import of its language, because the court may think that its penalties are unwise or harsh would make the judicial superior to the legislative branch of the government, and practically invest it with the lawmaking power. ..."

Sutherland, Statutory Construction, §46.03 (citation omitted).

If the plain language of the sentencing statute did not preclude the imposition of the additional firearm enhancement under subsection (4), the rule of lenity would require this interpretation of the statute. The rule requires that criminal sentencing statutes be construed strictly so that penalties unintended by the legislature are not imposed. See State v. Egbert, 748 P.2d 558, 562 (Utah 1987)(Durham, J., dissenting)("It is well established that

ambiguities in criminal statutes must be resolved in favor of lenity."); Abreu and Thornbrugh, supra (utilizing the rule of lenity in interpreting the federal firearm statute).

This Court should reverse the portion of the sentence imposing a five year firearm enhancement.

CONCLUSION

This Court should reverse Mr. Ewell's conviction in case no. 911901244, and reverse the five year firearm enhancement under Utah Code Ann. section 76-3-203(4).

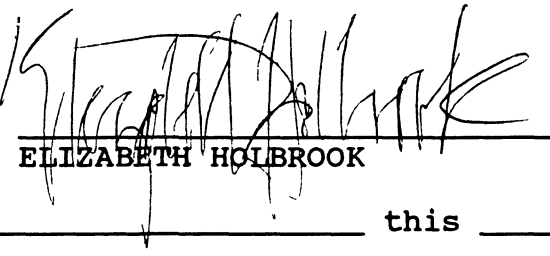
RESPECTFULLY SUBMITTED this 17 day of March, 1992.

CHARLES F. LOYD, JR.
Attorney for Mr. Ewell

ELIZABETH HOLBROOK
Attorney for Mr. Ewell

CERTIFICATE OF MAILING

I, Elizabeth Holbrook, hereby certify that I have caused to be served eight copies of the foregoing to the Utah Court of Appeals and four copies of the foregoing to the Attorney General's Office, 236 State Capitol, Salt Lake City, Utah 84114, this 17 day of Nov., 1992.



ELIZABETH HOLBROOK

DELIVERED by _____ this _____ day of Nov., 1992.

_____

APPENDIX 1

Statutes and Constitutional Provisions

ARTICLE I

DECLARATION OF RIGHTS

Sec. 7. [Due process of law.]

No person shall be deprived of life, liberty or property, without due process of law.

Sec. 10. [Trial by jury.]

In capital cases the right of trial by jury shall remain inviolate. In courts of general jurisdiction, except in capital cases, a jury shall consist of eight jurors. In courts of inferior jurisdiction a jury shall consist of four jurors. In criminal cases the verdict shall be unanimous. In civil cases three-fourths of the jurors may find a verdict. A jury in civil cases shall be waived unless demanded.

Sec. 12. [Rights of accused persons.]

In criminal prosecutions the accused shall have the right to appear and defend in person and by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to be confronted by the witnesses against him, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed, and the right to appeal in all cases. In no instance shall any accused person, before final judgment, be compelled to advance money or fees to secure the rights herein guaranteed. The accused shall not be compelled to give evidence against himself; a wife shall not be compelled to testify against her husband, nor a husband against his wife, nor shall any person be twice put in jeopardy for the same offense.

ARTICLE V

DISTRIBUTION OF POWERS

Section 1. [Three departments of government.]

The powers of the government of the State of Utah shall be divided into three distinct departments, the Legislative, the Executive, and the Judicial; and no person charged with the exercise of powers properly belonging to one of these departments, shall exercise any functions appertaining to either of the others, except in the cases herein expressly directed or permitted.

AMENDMENT V

[Criminal actions — Provisions concerning — Due process of law and just compensation clauses.]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI

[Rights of accused.]

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of counsel for his defence.

76-3-203. Felony conviction — Indeterminate term of imprisonment — Increase of sentence if firearm used.

A person who has been convicted of a felony may be sentenced to imprisonment for an indeterminate term as follows:

(1) In the case of a felony of the first degree, for a term at not less than five years, unless otherwise specifically provided by law, and which may be for life but if the trier of fact finds a firearm or a facsimile or the representation of a firearm was used in the commission or furtherance of the felony, the court shall additionally sentence the person convicted for a term of one year to run consecutively and not concurrently; and the court may additionally sentence the person convicted for an indeterminate term not to exceed five years to run consecutively and not concurrently;

(2) In the case of a felony of the second degree, for a term at not less than one year nor more than 15 years but if the trier of fact finds a firearm or a facsimile or the representation of a firearm was used in the commission or furtherance of the felony, the court shall additionally sentence the person convicted for a term of one year to run consecutively and not concurrently; and the court may additionally sentence the person convicted for an indeterminate term not to exceed five years to run consecutively and not concurrently;

(3) In the case of a felony of the third degree, for a term not to exceed five years but if the trier of fact finds a firearm or a facsimile or the representation of a firearm was used in the commission or furtherance of the felony, the court may additionally sentence the person convicted for an indeterminate term not to exceed five years to run consecutively and not concurrently.

(4) Any person who has been sentenced to a term of imprisonment for a felony in which a firearm was used or involved in the accomplishment of the felony and is convicted of another felony when a firearm was used or involved in the accomplishment of the felony shall, in addition to any other sentence imposed, be sentenced for an indeterminate term to be not less than five nor more than ten years to run consecutively and not concurrently.

76-6-302. Aggravated robbery.

(1) A person commits aggravated robbery if in the course of committing robbery, he:

(a) uses or threatens to use a dangerous weapon as defined in Section 76-1-601; or

(b) causes serious bodily injury upon another.

(2) Aggravated robbery is a first degree felony.

(3) For the purposes of this part, an act shall be considered to be "in the course of committing a robbery" if it occurs in an attempt to commit, during the commission of, or in the immediate flight after the attempt or commission of a robbery.

76-8-1001. Habitual criminal — Determination.

Any person who has been twice convicted, sentenced, and committed for felony offenses at least one of which offenses having been at least a felony of the second degree or a crime which, if committed within this state would have been a capital felony, felony of the first degree or felony of second degree, and was committed to any prison may, upon conviction of at least a felony of the second degree committed in this state, other than murder in the first or second degree, be determined as a habitual criminal and be imprisoned in the state prison for from five years to life.

77-1-6. Rights of defendant.

(1) In criminal prosecutions the defendant is entitled:

(a) To appear in person and defend in person or by counsel;

(b) To receive a copy of the accusation filed against him;

(c) To testify in his own behalf;

(d) To be confronted by the witnesses against him;

(e) To have compulsory process to insure the attendance of witnesses in his behalf;

(f) To a speedy public trial by an impartial jury of the county or district where the offense is alleged to have been committed;

(g) To the right of appeal in all cases; and

(h) To be admitted to bail in accordance with provisions of law, or be entitled to a trial within 30 days after arraignment if unable to post bail and if the business of the court permits.

(2) In addition:

(a) No person shall be put twice in jeopardy for the same offense;

(b) No accused person shall, before final judgment, be compelled to advance money or fees to secure rights guaranteed by the Constitution or the laws of Utah, or to pay the costs of those rights when received;

(c) No person shall be compelled to give evidence against himself;

(d) A wife shall not be compelled to testify against her husband nor a husband against his wife; and

(e) No person shall be convicted unless by verdict of a jury, or upon a plea of guilty or no contest, or upon a judgment of a court when trial by jury has been waived or, in case of an infraction, upon a judgment by a magistrate.

Rule 46. Exceptions unnecessary.

Formal exceptions to rulings or orders of the court are unnecessary. It is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take or his objection to the action of the court and his grounds therefor; and, if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice him.

Rule 47. Jurors.

(a) **Examination of jurors.** The court may permit the parties or their attorneys to conduct the examination of prospective jurors or may itself conduct the examination. In the latter event, the court shall permit the parties or their attorneys to supplement the examination by such further inquiry as is material and proper or shall itself submit to the prospective jurors such additional questions of the parties or their attorneys as is material and proper.

(b) **Alternate jurors.** The court may direct that one or two jurors in addition to the regular panel be called and impanelled to sit as alternate jurors. Alternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury retires to consider its verdict, become unable or disqualified to perform their duties. Alternate jurors shall be drawn in the same manner, shall have the same qualifications, shall be subject to the same examination and challenges, shall take the same oath, and shall have the same functions, powers, facilities, and privileges as the principal jurors. An alternate juror who does not replace a principal juror shall be discharged after the jury retires to consider its verdict. If one or two alternate jurors are called each party is entitled to one peremptory challenge in addition to those otherwise allowed. The additional peremptory challenge may be used only against an alternate juror, and the other peremptory challenges allowed by law shall not be used against the alternates.

(c) **Challenge defined; by whom made.** A challenge is an objection made to the trial jurors and may be directed (1) to the panel or (2) to an individual juror. Either party may challenge the jurors, but where there are several parties on either side, they must join in a challenge before it can be made.

(d) **Challenge to panel; time and manner of taking; proceedings.** A challenge to the panel can be founded only on a material departure from the forms prescribed in respect to the drawing and return of the jury, or on the intentional omission of the proper officer to summon one or more of the jurors drawn. It must be taken before a juror is sworn. It must be in writing or be noted by the reporter, and must specifically set forth the facts constituting the ground of challenge. If the challenge is allowed, the court must discharge the jury so far as the trial in question is concerned.

(e) **Challenges to individual jurors; number of peremptory challenges.** The challenges to individual jurors are either peremptory or for cause. Each party shall be entitled to three peremptory challenges, except as provided under Subdivisions (b) and (c) of this rule.

(f) **Challenges for cause; how tried.** Challenges for cause may be taken on one or more of the following grounds:

(1) A want of any of the qualifications prescribed by law to render a person competent as a juror.

(2) Consanguinity or affinity within the fourth degree to either party, or to an officer of a corporation that is a party.

(3) Standing in the relation of debtor and creditor, guardian and ward, master and servant, employer and employee or principal and agent, to either party, or united in business with either party, or being on any bond or obligation for either party; provided, that the relationship of debtor and creditor shall be deemed not to exist between a municipality and a resident thereof indebted to such municipality by reason of a tax, license fee, or service charge for water power, light or other services rendered to such resident.

(4) Having served as a juror, or having been a witness, on a previous trial between the same parties for the same cause of action, or being then a witness therein.

(5) Pecuniary interest on the part of the juror in the result of the action, or in the main question involved in the action, except his interest as a member or citizen of a municipal corporation.

(6) That a state of mind exists on the part of the juror with reference to the cause, or to either party, which will prevent him from acting impartially and without prejudice to the substantial rights of the party challenging; but no person shall be disqualified as a juror by reason of having formed or expressed an opinion upon the matter or cause to be submitted to such jury, founded upon public rumor, statements in public journals or common notoriety, if it satisfactorily appears to the court that the juror can and will, notwithstanding such opinion, act impartially and fairly upon the matter to be submitted to him.

Any challenge for cause shall be tried by the court. The juror challenged, and any other person, may be examined as a witness on the trial of such challenge.

(g) **Selection of jury.** The clerk shall draw by lot and call the number of jurors that are to try the cause plus such an additional number as will allow for all peremptory challenges permitted. After each challenge for cause sustained, another juror shall be called to fill the vacancy before further challenges are made, and any such new juror may be challenged for cause. When the challenges for cause are completed, the clerk shall make a list of the jurors remaining, in the order called, and each side, beginning with the plaintiff, shall indicate thereon its peremptory challenge to one juror at a time in regular turn until all peremptory challenges are exhausted or waived. The clerk shall then call the remaining jurors, or so many of them as shall be necessary to constitute the jury, in the order in which they appear on the list, and the persons whose names are so called shall constitute the jury.

(h) **Oath of jury.** As soon as the jury is completed an oath must be administered to the jurors, in substance, that they and each of them will well and truly try the matter in issue between the parties, and a true verdict rendered according to the evidence and the instructions of the court.

(i) **Proceedings when juror discharged.** If, after the impanelling of the jury and before verdict, a juror becomes unable or disqualified to perform his duty and there is no alternate juror, the parties may agree to proceed with the other jurors, or to swear a new juror and commence the trial anew. If the parties do not so agree the court shall discharge the jury and the case shall be tried with a new jury.

(j) **View by jury.** When in the opinion of the court it is proper for the jury to have a view of the property which is the subject of litigation, or of the place in which any material fact occurred, it may order them to be conducted in a body under the charge of an officer to the place, which shall be shown to them by some person appointed by the court for that purpose. While the jury are thus absent no person other than the person so appointed shall speak to them on any subject connected with the trial.

(k) **Separation of jury.** If the jurors are permitted to separate, either during the trial or after the case is submitted to them, they shall be admonished

by the court that it is their duty not to converse with, or suffer themselves to be addressed by, any other person on any subject of the trial, and that it is their duty not to form or express an opinion thereon until the case is finally submitted to them.

(l) **Deliberation of jury.** When the case is finally submitted to the jury they may decide in court or retire for deliberation. If they retire they must be kept together in some convenient place under charge of an officer until they agree upon a verdict or are discharged, unless otherwise ordered by the court. Unless by order of the court, the officer having them under his charge must not suffer any communication to be made to them, or make any himself, except to ask them if they have agreed upon their verdict, and he must not, before the verdict is rendered, communicate to any person the state of their deliberations or the verdict agreed upon.

(m) **Papers taken by jury.** Upon retiring for deliberation the jury may take with them the instructions of the court and all exhibits and all papers which have been received as evidence in the cause, except depositions or copies of such papers as ought not, in the opinion of the court, to be taken from the person having them in possession; and they may also take with them notes of the testimony or other proceedings on the trial taken by themselves or any of them, but none taken by any other person.

(n) **Additional instructions of jury.** After the jury have retired for deliberation, if there is a disagreement among them as to any part of the testimony, or if they desire to be informed on any point of law arising in the cause, they may require the officer to conduct them into court. Upon their being brought into court the information required must be given in the presence of, or after notice to, the parties or counsel. Such information must be given in writing or taken down by the reporter.

(o) **New trial when no verdict given.** If a jury is discharged or prevented from giving a verdict for any reason, the action shall be tried anew.

(p) **Court deemed in session pending verdict; verdict may be sealed.** While the jury is absent the court may be adjourned from time to time in respect to other business, but it shall be open for every purpose connected with the cause submitted to the jury, until a verdict is rendered or the jury discharged. The court may direct the jury to bring in a sealed verdict at the opening of the court, in case of an agreement during a recess or adjournment for the day.

(q) **Declaration of verdict.** When the jury or three-fourths of them, or such other number as may have been agreed upon by the parties pursuant to Rule 48, have agreed upon a verdict they must be conducted into court, their names called by the clerk, and the verdict rendered by their foreman; the verdict must be in writing, signed by the foreman, and must be read by the clerk to the jury, and the inquiry made whether it is their verdict. Either party may require the jury to be polled, which shall be done by the court or clerk asking each juror if it is his verdict. If, upon such inquiry or polling there is an insufficient number of jurors agreeing therewith, the jury must be sent out again; otherwise the verdict is complete and the jury shall be discharged from the cause.

(r) **Correction of verdict.** If the verdict rendered is informal or insufficient, it may be corrected by the jury under the advice of the court, or the jury may be sent out again.

Rule 18. Selection of jury.

(a) The clerk shall draw by lot and call the number of the jurors that are to try the cause plus such an additional number as will allow for all peremptory challenges permitted. After each challenge for cause sustained, another juror shall be called to fill the vacancy before further challenges are made, and any such new juror may be challenged for cause. When the challenges for cause are completed, the clerk shall make a list of the jurors remaining, and each side, beginning with the prosecution, shall indicate thereon its peremptory challenge to one juror at a time in regular turn, as the court may direct, until all peremptory challenges are exhausted or waived. The clerk shall then call the remaining jurors, or so many of them as shall be necessary to constitute the jury, in the order in which they appear on the list, and the persons whose names are so called shall constitute the jury.

(b) The court may permit counsel or the defendant to conduct the examination of the prospective jurors or may itself conduct the examination. In the latter event, the court may permit counsel or the defendant to supplement the examination by such further inquiry as it deems proper, or may itself submit to the prospective jurors additional questions requested by counsel or the defendant.

(c) A challenge may be made to the panel or to an individual juror.-

(1) The panel is a list of jurors called to serve at a particular court or for the trial of a particular action. A challenge to the panel is an objection made to all jurors summoned and may be taken by either party.

(i) A challenge to the panel can be founded only on a material departure from the procedure prescribed with respect to the selection, drawing, summoning and return of the panel.

(ii) The challenge to the panel shall be taken before the jury is sworn and shall be in writing or recorded by the reporter. It shall specifically set forth the facts constituting the grounds of the challenge.

(iii) If a challenge to the panel is opposed by the adverse party, a hearing may be had to try any question of fact upon which the challenge is based. The jurors challenged, and any other persons, may be called as witnesses at the hearing thereon.

(iv) The court shall decide the challenge. If the challenge to the panel is allowed, the court shall discharge the jury so far as the trial in question is concerned. If a challenge is denied, the court shall direct the selection of jurors to proceed.

(2) A challenge to an individual juror may be either peremptory or for cause. A challenge to an individual juror may be made only before the jury is sworn to try the action, except the court may, for good cause, permit it to be made after the juror is sworn but before any of the evidence is presented. In challenges for cause the rules relating to challenges to a panel and hearings thereon shall apply. All challenges for cause shall be taken first by the prosecution and then by the defense.

(d) A peremptory challenge is an objection to a juror for which no reason need be given. In capital cases, each side is entitled to 10 peremptory challenges. In other felony cases each side is entitled to four peremptory challenges. In misdemeanor cases, each side is entitled to three peremptory challenges. If there is more than one defendant the court may allow the defendants additional peremptory challenges and permit them to be exercised separately or jointly.

(e) The challenge for cause is an objection to a particular juror and may be taken on one or more of the following grounds:

(1) want of any of the qualifications prescribed by law;

(2) any mental or physical infirmity which renders one incapable of performing the duties of a juror;

(3) consanguinity or affinity within the fourth degree to the person alleged to be injured by the offense charged, or on whose complaint the prosecution was instituted;

(4) the existence of any social, legal, business, fiduciary or other relationship between the prospective juror and any party, witness or person alleged to have been victimized or injured by the defendant, which relationship when viewed objectively, would suggest to reasonable minds that the prospective juror would be unable or unwilling to return a verdict which would be free of favoritism. A prospective juror shall not be disqualified solely because he is indebted to or employed by the state or a political subdivision thereof;

(5) having been or being the party adverse to the defendant in a civil action, or having complained against or having been accused by him in a criminal prosecution;

(6) having served on the grand jury which found the indictment;

(7) having served on a trial jury which has tried another person for the particular offense charged;

(8) having been one of a jury formally sworn to try the same charge, and whose verdict was set aside, or which was discharged without a verdict after the case was submitted to it;

(9) having served as a juror in a civil action brought against the defendant for the act charged as an offense;

(10) if the offense charged is punishable with death, the entertaining of such conscientious opinions about the death penalty as would preclude the juror from voting to impose the death penalty following conviction regardless of the facts;

(11) because he is or, within one year preceding, has been engaged or interested in carrying on any business, calling or employment, the carrying on of which is a violation of law, where defendant is charged with a like offense;

(12) because he has been a witness, either for or against the defendant on the preliminary examination or before the grand jury;

(13) having formed or expressed an unqualified opinion or belief as to whether the defendant is guilty or not guilty of the offense charged; or

(14) that a state of mind exists on the part of the juror with reference to the cause, or to either party, which will prevent him from acting impartially and without prejudice to the substantial rights of the party challenging; but no person shall be disqualified as a juror by reason of having formed or expressed an opinion upon the matter or cause to be submitted to such jury, founded upon public rumor, statements in public journals or common notoriety, if it satisfactorily appears to the court that the juror can and will, notwithstanding such opinion, act impartially and fairly upon the matter to be submitted to him.

(f) Peremptory challenges shall be taken first by the prosecution and then by the defense alternately. Challenges for cause shall be completed before peremptory challenges are taken.

(g) The court may direct that alternate jurors be impanelled. Alternate jurors, in the order in which they are called, shall replace jurors who are, or become, unable or disqualified to perform their duties. The prosecution and defense shall each have one additional peremptory challenge for each alternate juror to be chosen.

Alternate jurors shall have the same qualifications, take the same oath and enjoy the same privileges as regular jurors.

(h) A statutory exemption from service as a juror is a privilege of the person exempted and is not a ground for challenge for cause.

(i) When the jury is selected an oath shall be administered to the jurors, in substance, that they and each of them will well and truly try the matter in issue between the parties, and render a true verdict according to the evidence and the instructions of the court.

Rule 20. Exceptions unnecessary.

Exceptions to rulings or orders of the court are unnecessary. It is sufficient that a party state his objections to the actions of the court and the reasons therefor. If a party has no opportunity to object to a ruling or order, the absence of an objection shall not thereafter prejudice him.

APPENDIX 2

Motion, Response, and Order Concerning Judicial Notice and/or Supplementation of the Record

ELIZABETH HOLBROOK, #5292
Attorney for Defendant/Appellant
SALT LAKE LEGAL DEFENDER ASSOCIATION
424 East 500 South, Suite 300
Salt Lake City, Utah 84111
Telephone: 532-5444

IN THE COURT OF APPEALS OF THE STATE OF UTAH

THE STATE OF UTAH,	:	MOTION AND ORDERS FOR JUDICIAL NOTICE AND/OR
Plaintiff/Appellee,	:	TO SUPPLEMENT THE RECORD AND TO STRIKE BRIEFING
v.	:	SCHEDULE
JASON EWELL,	:	Case No. 920379-CA Priority No. 2
Defendant/Appellant.	:	

COMES NOW Defendant/Appellant, Jason Ewell, by and through counsel of record, Elizabeth Holbrook, pursuant to Utah Rule of Evidence 201 and Utah Rule of Appellate Procedure 11(h), and moves this Court to take judicial notice of and/or supplement the record with the transcript of the voir dire in State v. Ramirez, Case No. 91190177, presided over by Judge John A. Rokich on December 10, 1992.

A copy of the transcript is filed separately with the Court of Appeals and with the Attorney General's Office today.

This motion is supported by a memorandum of points and authorities, attached to this motion.

Mr. Ewell further moves that the briefing schedule be stricken pending resolution of this motion. The State stipulates to striking the briefing schedule, and reserves the right to file a

separate response to the motion for judicial notice and/or for supplementation of the record.

The opening brief is currently due on October 19, 1992.

DATED this 14 day of October, 1992.

ELIZABETH HOLBROOK
Attorney for Defendant/Appellant

STIPULATION

I, David B. Thompson, hereby stipulate to striking the briefing schedule pending resolution of the motion for judicial notice and/or to supplement the record. The State reserves the right to file a separate response to the motion for judicial notice and/or to supplement the record.

DATED this 15th day of October, 1992.

DBT

DAVID B. THOMPSON
Assistant Attorney General

ORDER

Based upon motion of Appellant and good cause appearing;

IT IS HEREBY ORDERED that the briefing schedule is stricken pending resolution of the motion for judicial notice and/or for supplementation of the record.

DATED this _____ day of _____, 1992.

BY THE COURT:

_____

COURT OF APPEALS JUDGE

ORDER

Based upon motion of Appellant and good cause appearing;

IT IS HEREBY ORDERED that the Court will take judicial notice of the transcript of State v. Ramirez, Case No. 91190177, tried before Judge Rokich on December 10, 1992.

DATED this _____ day of _____, 1992.

BY THE COURT:

_____

COURT OF APPEALS JUDGE

ORDER

Based upon motion of Appellant and good cause appearing;

IT IS HEREBY ORDERED that the record shall be supplemented with the transcript of State v. Ramirez, Case No. 91190177, tried before Judge Rokich on December 10, 1992.

DATED this _____ day of _____, 1992.

BY THE COURT:

_____
COURT OF APPEALS JUDGE

ELIZABETH HOLBROOK, #5292
Attorney for Defendant/Appellant
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424 East 500 South, Suite 300
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Telephone: 532-5444

IN THE COURT OF APPEALS OF THE STATE OF UTAH

THE STATE OF UTAH,	:	MEMORANDUM IN SUPPORT OF MOTION FOR JUDICIAL NOTICE
Plaintiff/Appellee,	:	AND/OR SUPPLEMENTATION OF THE RECORD
v.	:	
JASON EWELL,	:	Case No. 920379-CA
		Priority No. 2
Defendant/Appellant.	:	

FACTS

Mr. Ewell was charged with one count of aggravated robbery (R. 6). Judge Sawaya presided over a jury trial on December 12 and 13 of 1991 (R. 17-19). The jury convicted Mr. Ewell as he was charged, and Judge Sawaya sentenced Mr. Ewell to serve a term of five years to life for the conviction charged in this case; to an additional five years for a "second conviction," and to an additional year for a "firearm enhancement." (R. 18, 102, 105).

At the beginning of the second day of trial, outside the presence of the jurors, defense counsel moved for a mistrial because he had discovered the night before that one of Mr. Ewell's jurors, Jeffrey Bogaard, had previously been excused for cause after he had indicated during Judge Rokich's voir dire in the case of State v.

Ramirez that Juror Bogaard would want to know why a criminal defendant did not testify when he was questioned concerning his potential biases about the defendant's right not to testify. Defense counsel noted that he was unsure as to exactly what Mr. Bogaard had said during the Ramirez voir dire. Defense counsel noted that Juror Bogaard had not indicated any potential bias concerning the defendant's right not to testify during the voir dire by Judge Sawaya in this case. Defense counsel indicated that Mr. Ewell did not intend to testify, indicated that Juror Bogaard's impartiality under Utah Rule of [Criminal] Procedure 18(e)(14) had been drawn into question, and that a mistrial was appropriate. (T. 175-176).

The trial court indicated it was his intention to deny the motion, but allowed the prosecutor to argue. The prosecutor argued that the record was insufficient to support a motion for a mistrial, that defense counsel had the opportunity to voir dire the jurors, and that defense counsel was relying on hearsay from other defense attorneys in seeking a mistrial. The prosecutor indicated that he himself did not know which jurors served on Judge Rokich's panel, and informed Judge Sawaya that he was not in a position to make a finding on that question. The prosecutor indicated that defense counsel was aware of something having happened (apparently the Rokich voir dire) the day before the Sawaya voir dire, and had the opportunity to participate in voir dire, and should not be arguing

on the basis of hearsay concerning what occurred in the Rokich voir dire. (T. 176-177).

The court ruled,

> I don't know what happened in Judge Rokich's court or what attitude Mr. Bogaard may have had at that time, but I am satisfied that during my voir dire of the panel, Mr. Bogaard and all the other jurors indicated they would be willing to follow the law as I instructed them and part of that was that the defendant has a right not to testify and that his failure to testify is not a circumstance that you can hold against him and no presumptions against him can be raised. I am satisfied that Mr. Bogaard and all the members of this panel are willing to follow the law of the case as I state it and that no adverse presumption would be raised against the defendant. So the motion will be denied.

(T. 177).

After the jury retired to deliberate, defense counsel sought to clarify the record, indicating that he did not know that jurors excused from Judge Rokich's voir dire were serving on Mr. Ewell's case until the morning of the second day of Mr. Ewell's trial. Defense counsel indicated his previous and incorrect assumption that the jurors who had indicated a bias against a defendant exercising his right to silence in the Rokich voir dire were not recycled in Judge Sawaya's court, and that he was unaware of the need to voir dire the jurors on their experience in Judge Rokich's voir dire in this case. (T. 217). Despite the trial court's indication that argument was unnecessary, the prosecutor stated his recollection of an in-chambers discussion of the fact

that jurors excused from Judge Rokich's court would be recycled in Mr. Ewell's case, and discussion of the reason that the jurors had been excused from Judge Rokich's court. (T. 217-218).

The trial court stated,

> I think the record has been made clear about the court's feeling about what occurred. I don't feel that the fact that they were disqualified or excused from service in Judge Rokich's court disqualifies them in service in this court. I think the court's questions on voir dire to each of those panel members gave them an opportunity to disclose their feeling or their reluctance to serve in this case based upon the defendant's failure to testify. No one responded. Even the one juror that was seated, Mr. Bogaard, was given an opportunity to indicate that the fact that the defendant might not testify would raise some questions in his mind about the response. I don't think there's any reason to feel that the jury was in any way tainted or that the defendant has been prejudiced in any manner by Mr. Bogaard being seated. So I think the record is clear on that issue.

(T. 218).

Mr. Bogaard was the foreman of Mr. Ewell's jury (T. 221-220).

During the voir dire in Judge Rokich's Ramirez case, Judge Rokich was unable to seat a jury on December 10, 1992, because fourteen of the prospective jurors indicated during voir dire in open court some bias against a defendant who does not testify (R.T. 43-46). Juror Bogaard, who did not indicate any bias of any nature during Mr. Ewell's voir dire with Judge Sawaya, indicated during the Ramirez voir dire, "I'm not sure if it would sway my opinion one way

or another. I would want -- depends on the course of the trial, it might sway me. I have no opinion one way or another. Depending on what comes out, it might have an effect." (R.T. 46). Prior to excusing the jurors in the Ramirez voir dire, Judge Rokich instructed the jurors on the defendant's right not to testify (R.T. 46-47), and lectured the jurors about their shocking inability to be fair and follow the law concerning the defendant's right to silence in Mr. Ramirez's case (R.T. 56-58).

Having had this learning experience in Judge Rokich's voir dire, Mr. Bogaard reported to Judge Sawaya's court on December 12, 1992. Early in the Ewell voir dire, Judge Sawaya inexplicably vilified one of the prospective jurors, undoubtedly impressing the prospective jurors with the need to answer the voir dire questions in a manner pleasing to the judge. At the outset of the voir dire, Judge Sawaya instructed the prospective jurors to state their name, employment, occupation, name of spouse and spouses' occupation (T. 3) The court's colloquy with one of the prospective jurors was as follows:

> Q: Delbert Iorg?
> A: None, none and single.
> Q: No occupation?
> A: No.
> Q: You have never worked in your life?
> A: Cleaning horse stalls for my dad.
> Q: Must do something, Mr. Iorg.
> THE COURT: You don't want to be here, do you?
> A: I don't know.
> THE COURT: We'll let you sit through the whole trial whether you like it or not.

(T. 7). In later voir dire, Mr. Iorg indicated that he read the Deseret News, and the trial court asked him, "Okay, what's the limit of your education?" (T. 30). Other jurors were asked how far they went in school (T. 26), or their "education" (T. 26, 31).

It appears that perhaps Judge Sawaya had heard of Judge Rokich's experience in the Ramirez case prior to this voir dire (T. 217-218, prosecutor's argument). Judge Sawaya addressed the jurors' possible biases concerning the defendant's general rights as follows:

> All right. Under the law, ladies and gentlemen, a defendant charged with a criminal offense is presumed to be innocent until he's been proved guilty beyond a reasonable doubt. This defendant comes here clothed with the presumption of innocence, meaning that the state has the burden of proving his guilt beyond a reasonable doubt. If the evidence doesn't rise to that level then your duty as jurors would be to return a verdict of not guilty. The defendant has a right to remain silent meaning he doesn't have to take the stand and testify unless he wishes to. The defendant may be satisfied with the evidence presented by the state and feel that there's nothing to add to it. Are there any of you who feel you cannot afford the defendant the benefit of the presumption of innocence and his right to remain silent? If for any reason you feel he is not entitled to those rights, would you raise your hand. The record may show that no hands are raised. Are there any of are you who feel that the defendant by reason of the fact that he's been charged with the commission of this offense is more likely to be guilty than innocent by reason of that fact alone? If you feel that way would you raise your hand. The record may show that no hands are raised.

(T. 11-12).

During voir dire, defense counsel asked the court to

inquire about whether the jurors felt that a defendant should come forward and testify, despite his right not to do so (T. 32). The court stated,

> Let me explain that before you respond to it. No criminal defendant has an obligation to testify. The constitution preserves the right to the remain silent of anybody who's accused and the fact that a defendant does not take the stand and testify can't be used against him. You can raise no presumptions against him because of that fact. I will ask whether or not, if this defendant for example decides not to testify, whether any of you would hold that against him or find that is something that is -- you should consider against him in determining his guilt or innocence? If you feel that way would you raise your hand. The record may show that no hands are raised.

(T. 32)(emphasis added).

ARGUMENT
THIS COURT SHOULD TAKE JUDICIAL NOTICE OF AND/OR SUPPLEMENT THE RECORD WITH THE ROKICH VOIR DIRE.

The Ramirez voir dire is necessary to Mr. Ewell's case in order for him to establish that Juror Bogaard failed to honestly answer a material question in Mr. Ewell's case, and that had Juror Bogaard honestly answered the question, his answer would have subjected Juror Bogaard to a for-cause challenge. See e.g. State v. Suarez, 793 P.2d 934, 938-39 (Utah App. 1990)(finding that recycled juror's failure to disclose bias in favor of police in second trial that he had disclosed in the first required a new trial). The trial court's failure to take any evidence on Juror Bogaard's performance

in Judge Rokich's voir dire is a result of the trial court's erroneous view of the law that the voir dire in Mr. Ewell's case demonstrated juror impartiality, and obviated any need to inquire into inconsistent answers given by Mr. Ewell's jurors during their voir dire with Judge Rokich.

This Court should exercise its discretion and take judicial notice of the Ramirez transcript. Utah Rule of Evidence 201 provides in part that "[a] judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." The rule further provides, "A court shall take judicial notice if requested by a party and supplied with the necessary information," and that "[j]udicial notice may be taken at any stage of the proceeding." The certified transcript of the Ramirez voir dire is sufficiently reliable, and taking judicial notice of it is appropriate and necessary. See State v. Bates, 61 P. 905 (Utah 1900) (state court will take judicial notice of court documents in federal case involving defendant and will "'generally take notice of whatever ought to be generally known, within the limits of its jurisdiction.'") (citations omitted).

This Court should supplement the record with the Ramirez transcript. Utah Rule of Appellate Procedure 11(h) provides, in

part, "If anything material to either party is omitted from the record by error accident or is misstated, the parties by stipulation, the trial court, or the appellate court, either before or after the record is transmitted, may direct that the omission or misstatement be corrected and if necessary that a supplemental record be certified and transmitted." Material evidence concerning Juror Bogaard's performance in Judge Rokich's court was erroneously omitted from the record, as a result of Judge Sawaya's erroneous view of the law, that satisfactory answers during his voir dire of Mr. Ewell's jurors obviated a need to inquire into their performance in Judge Rokich's court. Supplementing the record with this transcript is appropriate under this Court's caselaw. See State v. Jesche, 793 P.2d 428, 429 (Utah Ct.App. 1990)(factors for appellate court to consider in supplementing the record are "the necessity of the supplemental material, prior opportunity to introduce the supplemental material and length of the resulting delay.").

CONCLUSION

This Court should take judicial notice of and/or supplement the record with the transcript of the voir dire in State v. Ramirez, Criminal No. 91190177, presided over by Judge John A. Rokich on December 10, 1992.

Respectfully submitted this 14 day of October, 1992.

ELIZABETH HOLBROOK
Attorney for Defendant/Appellant

CERTIFICATE OF DELIVERY

I, ELIZABETH HOLBROOK, hereby certify that I have caused a copy of the foregoing to be delivered to the Attorney General's Office, 236 State Capitol, Salt Lake City, Utah 84114, this 14 day of October, 1992.

ELIZABETH HOLBROOK

DELIVERED/MAILED a copy of the foregoing to the Attorney General's Office, 236 State Capitol, Salt Lake City, Utah 84114, this 14 day of October, 1992.

1/29/92

R. PAUL VAN DAM, #3312
Utah Attorney General
KRIS C. LEONARD, #4902
Assistant Attorney General
236 State Capitol Building
Salt Lake City, Utah 84114
Telephone: (801) 538-1021

Attorneys for Plaintiff-Appellee

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff/Appellee,	:	MEMORANDUM OPPOSING MOTION FOR JUDICIAL NOTICE AND/OR TO SUPPLEMENT THE RECORD
v.	:	
JASON EWELL,	:	Case No. 920379-CA
Defendant/Appellant.	:	

The State, by and through counsel Kris C. Leonard, Assistant Attorney General, hereby responds to defendant Jason Ewell's motion for judicial notice and/or to supplement the record and to strike the briefing schedule. This response is filed pursuant to rule 23(a), Utah Rules of Appellate Procedure.

STATEMENT OF FACTS

Defendant Jason Ewell appeals from his conviction by a jury of aggravated robbery, a first degree felony, in violation of Utah Code Ann. § 76-6-302 (1990) (R. 105).[1] Jury selection

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[1] Defendant originally filed separate appeals stemming from a conviction on a guilty plea to one count of aggravated robbery and a conviction by a jury for one count of aggravated robbery. The cases were consolidated by this Court's order dated September 16, 1992, pursuant to the parties' stipulated motion to consolidate. The records for both cases have been included in the appellate record. All citations to the record in this memorandum are to the record in District Court No. 911901244 unless otherwise noted.

for defendant's trial began on December 12, 1991 (R. 17). During the voir dire, the court questioned the jurors concerning their ability to "afford to the defendant the benefit of the presumption of innocence and his right to remain silent" should he choose not to testify at trial (Trial Transcript [hereinafter Tr.] at 11). The lack of response from any juror indicates that all of them believed that they could properly apply both the presumption of innocence and the right to remain silent. Defendant later requested further inquiry by the court on the same subject (Tr. at 31-32). The court explained the defendant's right to remain silent and further inquired whether the jurors would consider defendant's failure to testify, if he so chose, against him in their deliberations (Tr. at 32). Again, none of the jurors responded, indicating that a failure to testify would not adversely affect their deliberations. Thereafter, the jury was impaneled, and the State presented the majority of its case before the proceedings adjourned for the day.

On December 13, defense counsel moved for a mistrial, informing the court that he had learned the night before that one of the jurors, Jeffrey Bogaard, had participated in voir dire proceedings in another court on December 10 and had been excused for cause based on a statement he had made regarding a defendant's choice not to testify at trial (Tr. at 175-76). Defense counsel offered only his verbal statement in support of his motion and made no proffer of evidence regarding the December 10 proceedings. Defendant contended that the new, albeit

unsubstantiated, information raised an inference of impartiality under Utah Rule of Criminal Procedure 18(e)(14) despite the fact that the juror had not indicated any potential bias during the voir dire in the instant case, thereby requiring declaration of a mistrial (Tr. at 176). The court denied defendant's motion (Tr. at 177). Defendant now seeks to include a transcript of the December 10 voir dire proceedings [hereinafter "voir dire transcript"] in the record on appeal.

ARGUMENT

POINT I

DETERMINATION OF DEFENDANT'S REQUEST THAT THIS COURT TAKE JUDICIAL NOTICE OF THE CERTIFIED TRANSCRIPT SHOULD AWAIT PLENARY BRIEFING OF ALL THE ISSUES RAISED IN THIS APPEAL

Defendant urges this Court to exercise its discretion to take judicial notice of the voir dire transcript from proceedings in another court pursuant to rule 201, Utah Rules of Evidence, arguing that the certified transcript he has supplied to this Court is "sufficiently reliable" and that taking such notice is appropriate and necessary. The State takes no position on the issue at this time, but advises that defendant's request is premature and would be more fully and accurately addressed and decided in the context of the entire case upon full briefing and analysis of all the proceedings and evidence had below. Full briefing of all the issues on appeal is further warranted where reversal on any of the remaining issues raised by defendant would render consideration of the judicial notice issue unnecessary.

Inclusion of the issue in the parties' briefing of the entire appeal would neither overburden nor complicate the briefing process and would engender no delay or prejudice to either side.

Should this Court choose to resolve the judicial notice issue prior to plenary briefing of the appeal, the State would request an opportunity to address the merits of the issue.

POINT II

SUPPLEMENTATION OF THE RECORD IS NOT APPROPRIATE UNDER RULE 11(H), UTAH RULES OF APPELLATE PROCEDURE

Defendant asserts, in the alternative, that this Court should permit supplementation of the record with the voir dire transcript because it was erroneously omitted from the record below due to the trial court's mistaken interpretation of the law.

Supplementation of the record on appeal is permitted by rule 11(h), Utah Rules of Appellate Procedure. Rule 11 provides that the record may be supplemented with anything material to either party "which is omitted from the record by error or accident or is misstated". Consideration of a motion to supplement the record requires evaluation of several factors, including "the necessity of the supplemental material, prior opportunity to introduce the supplemental material and length of the resulting delay." Jeschke v. Willis, 793 P.2d 428, 428-29 (Utah App. 1990).

While the necessity and materiality of the voir dire transcript should be determined in the context of the entire

appeal and upon full analysis of all the issues to be raised by defendant (see Point I, above), it is clear that the transcript was not omitted from the record either by error or by accident as contemplated by rule 11 inasmuch as it was not intended to be included in the record and was never offered below despite ample opportunity. Defendant attributes the omission to error on the part of the trial court when in fact defendant himself failed to include any form of documentation of the voir dire proceedings in the record. Although he addressed the impartiality issue on the second day of the trial and again after the jury had retired to deliberate, defendant failed to submit the transcript, an affidavit or any other form of evidence regarding the December 10 voir dire, did not suggest that the trial court might consider such evidence, and did not request that the trial court take judicial notice of the December 10 voir dire proceedings. Defendant's attempt to expand rule 11 beyond its contemplated purpose to introduce into the appellate record material neither advanced or contemplated below should be rejected. See Olson v. Park-Craig-Olson, Inc., 815 P.2d 1356, 1359 (Utah App. 1991) (rule 11 was not intended to allow introduction of new material into the record); State v. Moosman, 794 P.2d 474, 478 n.17 (Utah 1990).

POINT III

THE BRIEFING SCHEDULE IN THIS MATTER SHOULD BE RESET TO ALLOW FOR PROMPT RESOLUTION OF THE APPEAL

The parties have stipulated to striking the briefing

schedule in this matter to allow defendant to present his motion regarding the December 10 voir dire. Should this Court defer its consideration and determination of the judicial notice issue and allow inclusion of the issue in the parties' full briefing of the appeal, the State would urge that the briefing schedule be reset as soon as possible to prevent any further delay in the resolution of this appeal.

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Court deny defendant's request to supplement the record with the voir dire transcript. The State further requests that this Court defer its consideration of defendant's motion to take judicial notice of the transcript, allowing inclusion of the issue in the parties' plenary briefing of this appeal. Finally, the State requests that this Court establish a new briefing schedule, permitting defendant thirty days from the date of this Court's decision in this matter in which to file his appeal, with the State's brief due thirty days thereafter.

RESPECTFULLY SUBMITTED this 26th day of October, 1992.

R. PAUL VAN DAM
Attorney General

KRIS C. LEONARD
Assistant Attorney General

MAILING CERTIFICATE

I hereby certify that a true and correct copy of the foregoing Memorandum Opposing Motion for Judicial Notice and/or to Supplement the Record was mailed, postage prepaid, to Elizabeth Holbrook, attorney for appellant, Salt Lake Legal Defender Association, 424 East 500 south, Suite 300, Salt Lake City, Utah 84111, this 26th day of October, 1992.

13/92

FILED

NOV 9 1992

IN THE UTAH COURT OF APPEALS

----ooOoo----

State of Utah,	)	
	)	ORDER
Plaintiff and Appellant,	)	
	)	Case No. 920379-CA
v.	)	
	)	
Jason Ewell,	)	
	)	
Defendant and Appellee.	)	

Before Judges Jackson, Bench, and Garff (on Law & Motion).

This matter is before the court on appellant's motion for judicial notice, motion to supplement the record and motion to strike the briefing schedule.

IT IS HEREBY ORDERED that the motions are denied. Appellant's brief shall be filed on or before November 17, 1992.

Dated this 9th day of November, 1992.

Norman H. Jackson, Judge

Russell W. Bench, Judge

Regnal W. Garff, Judge

CERTIFICATE OF MAILING

I hereby certify that on the 9th day of November, 1992, a true and correct copy of the foregoing ORDER was hand-delivered to a personal representative of the Legal Defender's Office and the Attorney General's Office to be delivered to the parties listed below:

Charles F. Loyd, Jr.
Elizabeth Holbrook
Ronald S. Fujino
Salt Lake Legal Defender Association
Attorneys at Law
424 East 500 South, Suite 300
Salt Lake City, UT 84111

R. Paul Van Dam
State Attorney General
Governmental Affairs
236 State Capitol
Salt Lake City, UT 84114

Dated this 9th day of November, 1992.

By Sheri Knighton
Deputy Clerk